

other appropriate action. The court's authority to give relief upon compliance with such terms as it may properly impose, including the payment of rental, either by moratorium pending a composition with creditors or by sale as the statute provides, remains unaffected. At least it has authority under § 75 (s) and is required to permit redemption of the property by the debtor before ordering a sale. *Wright v. Union Central Ins. Co., supra.*

We are of opinion that the bankruptcy court has jurisdiction over the debtor's interest in the property in question, and that in its sound discretion it should, in every practicable way, exercise that jurisdiction for the protection of the interest of the debtor as the statute directs.

The judgment below should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed

ETTELSON ET AL. v. METROPOLITAN LIFE
INSURANCE CO.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 70. Argued November 12, 13, 1942.—Decided December 7, 1942.

1. In a civil action in the federal District Court against an insurer to recover the proceeds of policies of life insurance, wherein the insurer filed a counterclaim alleging fraud by the insured in the procurement of the policies and praying their cancellation and that further prosecution of the action be enjoined, an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint is an interlocutory order granting an injunction, within the meaning of Judicial Code § 129, and is appealable under that Section. : P. 190.

The provisions of Rule 1 of the Rules of Civil Procedure, that the object of the Rules is "to secure the just, speedy, and inexpensive determination of every action," and of Rule 2, that "there shall be one form of action to be known as 'civil action,'" do not require a different result.

2. Local law has no bearing on the question here determined. P. 191.
3. The applicability of Jud. Code § 129 is determined not by the terminology of the order but by its substantial effect. P. 192.

CERTIFICATE from the Circuit Court of Appeals upon an appeal to that court from an interlocutory order of the District Court, 42 F. Supp. 488. The suit, to recover upon policies of life insurance, was begun in a state court but was removed by the defendant to the federal court.

Mr. Conover English for the Metropolitan Life Insurance Co.

Mr. Arthur T. Vanderbilt argued the cause, and *Mr. Jack Rinzler* entered an appearance, for Adrian Ettelson et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has certified the following question:

"In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b¹ of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129² of the Judicial Code and therefore appealable under that section?"

From the certificate it appears that the question arises upon these facts: The plaintiffs filed, in a New Jersey state court, a complaint in five counts to recover amounts alleged to be due plaintiffs by the defendant on life insur-

¹ 28 U. S. C. § 398.

² 28 U. S. C. § 227.

ance policies issued by it upon the life of Richard Ettelson, deceased. The cause was removed to the United States District Court for New Jersey. Plaintiffs demanded a jury trial. The defendant filed an answer in the District Court setting up that the policies were obtained by the fraud of the insured and are void because of material false statements made by the insured in the application for the policies. The answer did not allege that the false statements were knowingly and intentionally made.

With the answer, the defendant filed a counterclaim alleging that the policies were obtained by the fraud of the insured and are void because of the material false statements made by him in the application; and prayed that the policies be decreed void upon the return by the defendant of the premiums paid thereon, and that the plaintiffs be enjoined from further prosecuting the action at law. The plaintiffs moved for dismissal of the counterclaim on the ground that the defendant has an adequate remedy at law on the law side of the court in the pending action in which issue has been joined; and further that the counterclaim fails to state a claim upon which equitable relief can or should be granted by the court.

The District Court denied the motion to dismiss and ordered that the counterclaim should be heard and disposed of by the court sitting in equity prior to trial of the issue made by the complaint and answer in the action at law. 42 F. Supp. 488. The plaintiffs thereupon appealed to the Circuit Court of Appeals; and the defendant moved that court to dismiss the appeal, in the view that the District Court's order is not appealable.

The parties agree that, if the question had arisen prior to the adoption of the Rules of Civil Procedure,³ our decision in *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, would require an affirmative answer to the question.

³ 308 U. S. 653; 28 U. S. C. 723c.

The defendant asserts, and the plaintiffs deny, that the Rules require a negative answer. The defendant points to Rule 1, which states that the object of the rules is "to secure the just, speedy, and inexpensive determination of every action"; and more particularly to Rule 2, which declares that "there shall be one form of action to be known as 'civil action.'"

The defendant's contention, in brief, is that whereas, when the *Enelow* case was decided, the distinction between actions at law and suits in equity in federal courts still persisted, this distinction has now been abolished; that equitable defenses, whether a bar to plaintiffs' recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and the counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs. We cannot agree.

At the argument of the cause much time was devoted to the applicable law of New Jersey, where the action originated. It was urged that, under that law, upon allegation and proof of innocent misrepresentations inducing the issue of a policy, an insurer is entitled to a decree canceling the policy and restraining any action at law upon it. It was urged that this feature of the local law must be considered in determining the appealability of the District Court's order. But, whatever effect should be given the New Jersey law in determining the correctness of the District Judge's action, the local law has no bearing upon the decision of the narrow question certified.

As in the *Enelow* case, so here, the result of the District Judge's order is the postponement of trial of the jury action based upon the policies; and it may, in practical

effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous, it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by § 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made. *Enelow v. New York Life Ins. Co.*, *supra*, p. 383. Compare *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 432; *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, 451; *Griesa v. Mutual Life Ins. Co.*, 165 F. 48, 49.

Question answered "Yes."

MILLER *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 76. Argued November 18, 1942.—Decided December 7, 1942.

1. The *in forma pauperis* statute (Act of July 20, 1892, as amended) does not entitle an indigent defendant in a criminal case to be furnished a verbatim transcript of the evidence at public expense. P. 197.
2. A verbatim transcript of all the evidence is not necessary for the preparation of a bill of exceptions; the bill may be prepared from the judge's or counsel's notes, or from the recollection of witnesses as to what occurred at the trial, or, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis of his ruling. P. 198.
3. Upon a petition to the Circuit Court of Appeals for rehearing of its affirmance, on an appeal *in forma pauperis*, of a conviction in a criminal case, it appeared that the petitioner's contention that the